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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1988

RONALD LACHMAN AND MARY ANN LACHMAN, ON BEHALF OF BENJAMIN LACHMAN, A MINOR,
Petitioners,

v.

ILLINOIS STATE BOARD OF EDUCATION, EAST MAINE SCHOOL DISTRICT 63, AND MAINE TOWNSHIP SPECIAL EDUCATION PROGRAM.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Questions Presented

1. Whether the preference for mainstream educational placement of a handicapped child, required by the Education for All Handicapped Children Act, 20 U.S.C. §§ 1401-1485, § 1412(5)(B) ("EAHCA"), takes precedence over the educational methodology chosen by a school district for generally educating similarly handicapped children.

2. Whether under 20 U.S.C. § 1412(5)(B) a handicapped child can be placed in "special classes" and removed from "the regular educational environment" without a finding that "the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily".

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Ronald and Mary Ann Lachman, as parents and guardians of Benjamin Lachman, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled proceeding on July 18, 1988.

Opinions Below

The opinion of the United States Court of Appeals for the Seventh Circuit in *Lachman v. Illinois State Board of Education, et al.* (Appendix A), is not reported. The Memorandum Order of the United States District Court

for the Northern District of Illinois, which is unpublished, appears in Appendix B. The decisions of the Level I and Level II Hearing Officers appear in Appendix C and Appendix D, respectively.

Jurisdiction

The judgment of the Court of Appeals for the Seventh Circuit was entered on July 18, 1988, and this petition was filed within ninety days thereafter. This Court's jurisdiction rests on 28 U.S.C. § 1254(1); the petition was timely filed under 28 U.S.C. § 2101(c).

Statutes Involved

Section 612(5)(B) of the Education For All Handicapped Children Act, 20 U.S.C. § 1412(5)(B):

> § 1412: In order to qualify for assistance under this subchapter in any fiscal year, a State shall demonstrate to the Commissioner that the following conditions are met ... (5) the State has established ... (B) procedures to assure that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily ....

Regulations of the Offices of the United States Department of Education, 34 C.F.R. § 300.550:

LEAST RESTRICTIVE ENVIRONMENT

(a) Each State Educational agency shall insure that each public agency establishes and implements procedures which meet the requirements of §§ 300.550—300.556.

(b) Each public agency shall insure:

(1) That to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and

(2) that special classes, separate schooling or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

Regulations of the Offices of the United States Department of Education, 34 C.F.R. § 300.552:

Each public agency shall insure that:

(a) Each handicapped child's educational placement:

(1) Is determined at least annually,

(2) Is based on his or her individualized education program, and

(3) Is as close as possible to the child's home;

(b) the various alternative placements included under § 300.551 are available to the extent necessary to implement the individualized education program for each handicapped child;

(c) Unless a handicapped child's individualized education program requires some other arrangement, the child is educated in the school which he or she would attend if not handicapped; and

(d) In selecting the least restrictive environment, consideration is given to any potential harmful effect on the child or on the quality of services which he or she needs.

Statement Of The Case

Benjamin Lachman is a six-year-old child who has been profoundly deaf since birth. Since December 1984, he has attended private Montessori schools in classes with children who were not hearing impaired. During the period from February through June 1987, under a temporary agreement with his school district, he attended his local public school in a regular classroom with non-handicapped students. Throughout his schooling he has had a cued speech interpreter to assist him in receiving whatever the teacher (and children) said.[1]

When Benjamin approached kindergarten age, his parents asked their school district to place him in his local public school kindergarten pursuant to the EAHCA, with a cued speech interpreter as a necessary "supplementary service." The school district and the agencies with which it contracted to provide special education services rejected that request, instead preparing an Individual Education Program ("IEP") which would place Benjamin in segregated special education classes in a school that was about a 40-minute bus trip from his home.[2] The IEP provided that

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[1] Cued speech is a tool for visually demonstrating all sounds used in the spoken English language; it enhances speech reading (lip reading) by using eight hand shapes in four positions close to the mouth to clarify phoneme ambiguities.

[2] The educators modified the IEP during this litigation to provide that Benjamin would be placed in a few classes with non-handicapped children. The District Court, without any

(Footnote continued on following page.)

Benjamin would be transitioned from speech reading with cued speech to sign language as a method of communication. "Total communication" (predominantly sign language) was the educators' choice of communication for all deaf children in Benjamin's school district.

Benjamin's parents initiated due process hearings under the EAHCA, 20 U.S.C. § 1415, contending that the applicable statutes mandated that Benjamin be placed in his local public school with non-handicapped children (commonly referred to as "mainstreaming") with the assistance of an interpreter if necessary, 20 U.S.C. § 1412(5). The hearing officers, the District Court (upon review under 20 U.S.C. § 1415(e)(2)) and the Seventh Circuit on appeal have deferred to the school district's choice of educational placement for Benjamin on the ground that the educators' decision as to the "methodology" for educating handicapped children takes precedence over the statutory preference for mainstream education for handicapped children.

Neither the hearing officers, the District Court nor the Court of Appeals made a finding that "the nature or severity of [Benjamin's] handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily," as petitioners contend is required by 20 U.S.C. § 1412(5)(B) before

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(Footnote continued from preceding page.)

factual basis, "anticipated" that Benjamin would be fully mainstreamed within a short period of time. (App. B, p. 24a) The Court of Appeals quoted this inaccurate "observation", but completely failed to address petitioners' contention that this "finding" was clearly erroneous. (App. A, p. 10a) Petitioners do not raise the issue in this Court because the legal issues raised are independent of the District Court's erroneous statement.

denying a handicapped child mainstream placement.[3] In fact, the findings of the District Court were directly to the contrary, reflecting Benjamin's success in a mainstream environment.

During the test period of several months agreed to by the school district, Benjamin was placed in a regular classroom in his local school with a cued speech interpreter. The testimony of his teacher, as found by the District Court, clearly demonstrated that not only did Benjamin keep up with the other students, but he took and passed the same test taken by the other children in the class to determine whether or not they were prepared to proceed to the next grade. The District Court found that Benjamin was "meeting academic expectations and is making social progress in the [regular local] classroom," and that he was "very successful in the Montessori program." (App. B, pp. 24a, 20a) The Court of Appeals completely ignored these findings, thus indicating that it considered Benjamin's satisfactory achievement of education in regular classrooms as irrelevant to its conclusion.

Reasons For Granting The Petition

1. This case presents an important question concerning the nature of the individualized education prescribed by federal law for handicapped children. Public schools in states which accept federal funds under the EAHCA are bound by the requirements of the Act, 20

[3] Nor has the school district raised cost as a defense. (App. A, p. 11a, n. 6) It is undisputed that the mainstream placement, with an interpreter, proposed by Benjamin's parents would be cheaper than sending Benjamin to the special classrooms proposed by the school district.

U.S.C. § 1412. The plain language of Section 1412(5)(B) of the EAHCA requires that a handicapped child be educated with non-handicapped children, with whatever supplementary services are necessary to accomplish that, *unless* the nature or severity of the child's handicap is such that it is not possible to do so. In the present case there has been no finding that Benjamin's handicap is such that he could not succeed in a regular classroom with the aid of an interpreter. To the contrary, the District Court's findings clearly indicate that Benjamin has been successful in mainstream classrooms, including the precise classroom his parents have requested, and by necessary inference would continue to be successful in a mainstream educational setting.

The District Court ignored the issue of mainstreaming under the EAHCA posed by petitioners. The Court of Appeals acknowledged the "mainstreaming obligation created by § 1412(5)(B)," but instead of enforcing that obligation, held that the "issue of mainstreaming is subsumed by the parties' disagreement as to methodology." (App. A, pp. 10a, 14a) Its conclusion was based upon the rationale that parents do not have a right to compel a school district to employ a specific methodology. (App. A, p.15a)

Benjamin's parents have never contended that they had a right to dictate the methodology of deaf education in general to the school district. What they have consistently contended is that Benjamin has a statutory right to attend school in a regular classroom at his local public school because of the overwhelming proof that his education in such an environment can, in the language of the EAHCA, "be achieved satisfactorily." His mainstreaming is made possible by the "supplementary service" of a cued speech interpreter who assists him in speech reading the English language regularly used in the classroom. While

the Court of Appeals held as a matter of law that the dispositive issue in this case centered on a disagreement as to the most appropriate method to facilitate the education of the handicapped child, petitioners submit that the only relevant disagreement between the parties under the EAHCA is between (i) fulltime education in a regular local classroom, and (ii) education largely in segregated special classes for deaf children in a distant school. The dispute over means of communication is significant only because over the past four years it has been amply demonstrated that a cued speech interpreter makes a regular classroom fully accessible for Benjamin.

The Seventh Circuit's interpretation of the EAHCA will deny handicapped children their statutory right to be educated in their regular, local classrooms "whenever possible." *See Board of Education v. Rowley*, 458 U.S. 176, 202, 102 S. Ct. 3034, 3049 (1982). Nothing in the Act provides that the mainstreaming obligation should be secondary to the choice of communication selected by a school district for teaching deaf children. Just the opposite is true. This Court should make it clear that if a supplemental service, such as an interpreter, whether for sign language or cued speech, can make a mainstream education viable for a particular child, that is what has been prescribed by Congress in the EAHCA.

2. The Seventh Circuit has misinterpreted *Rowley*, 458 U.S. at 176, the only relevant Supreme Court authority. In *Rowley*, the Court discussed mainstreaming under the EAHCA, but there was no mainstreaming issue because Amy Rowley was already attending her regular local classroom. 458 U.S. at 184. The issue in the case was whether under the Act she would be provided with a sign language interpreter as a supplementary service in her mainstreamed classroom. The Court held that the school officials were not obligated to provide that service because

Amy Rowley was succeeding in the mainstream without it. 458 U.S. at 209-210. This Court should ensure the correct application of the EAHCA by clarifying the fact that *Rowley* does not stand for the proposition that educators' decisions on methodology take precedence over the mainstreaming requirements in the Act.

The Court in *Rowley* held that *once the requirements of the Act have been met*, questions of methodology are for resolution by the education officials. 458 U.S. at 208. The Seventh Circuit correctly held that "the mainstreaming preference articulated in § 1412(5)(B) is one of the 'requirements of the Act' referred to" in *Rowley*. (App. A, p. 10a) However, instead of following the teaching of this Court in *Rowley*, which placed the requirements of the Act first and questions of methodology second, the Court of Appeals took it upon itself to decide which of the issues predominates. Contrary to *Rowley*, the Seventh Circuit held that the issue of mainstreaming was "subsumed" by the parties' disagreement as to methodology.

Having stated this theory, the Court of Appeals went on to find that the District Court acted properly when it held, without even addressing the § 1412(5)(B) mainstreaming issue, that it must defer to the school officials' decision as to the appropriate educational placement for Benjamin. The Court of Appeals held that, in doing so, the District Court's analysis closely tracked the *Rowley* opinion, and concluded that *Rowley* does not allow parents to compel a school district to provide a specific program or employ a specific methodology. (App. A, p. 15a)

This analysis mistakenly subordinates the mainstreaming requirement imposed by the Act. It is not the parents of a handicapped child, but Congress, through the

EAHCA, which compels a school district to use reasonable supplementary services to enable the child to attend classes with his non-handicapped peers, even if those same services are not normally used in the special education classes in the schools.

If the Seventh Circuit's decision is allowed to stand, the mainstreaming requirement of the EAHCA will be effectively nullified because every decision by school officials with respect to the placement of a handicapped child can be interpreted as a question of educational methodology. The Court of Appeals paid lip service to the requirement that courts must make "an independent decision as to whether the requirements of the Act have been satisfied" (App. A, pp. 6a-7a), but then paid absolute deference to the determination by the school officials with respect to the "methodology of education" of Benjamin Lachman, holding that such determination predominated over the mainstreaming requirement of the Act. The Court of Appeals' decision does not just affect the education of one deaf child, but if allowed to stand, will permit school districts throughout the United States to misapply *Rowley* and deny mainstream education to handicapped children whenever mainstreaming does not suit the educators' approach to special education.

3. Despite the Court of Appeals' discussion of *Roncker v. Walter*, 700 F.2d 1058 (6th Cir.), *cert. denied*, 464 U.S. 864 (1983) (App. A, pp. 10a-11a), the approach taken by the Seventh Circuit on the issue of mainstreaming is in conflict with the Sixth Circuit's approach in *Roncker*.

The Court in *Roncker* recognized that mainstreaming was to be provided "to the maximum extent appropriate," and that some placements which may be better "for academic reasons may not be appropriate because of the failure to provide for mainstreaming." 700 F.2d at 1063. The Court in *Roncker* further stated that if necessary

services could feasibly be provided in a nonsegregated setting, then segregated placement would be inappropriate under the EAHCA. *Id.*

The Seventh Circuit in this case held that "the Act's mainstreaming preference is to be given effect only when it is clear that the education of the particular handicapped child can be achieved satisfactorily in the type of mainstream environment" sought by the parents. (App. A, p. 11a) The Court of Appeals' articulation turns around the emphasis of § 1412(5)(B), as spelled out in *Roncker.* Instead of recognizing the Act's presumption in favor of educating a handicapped child in his regular local classroom, the Seventh Circuit would place the burden of proof upon those who would argue for such placement.

The Seventh Circuit decision is also in conflict with the interpretation of the EAHCA by the Eighth Circuit in *Springdale School District v. Grace*, 494 F. Supp. 266 (W.D. Ark. 1980), *aff'd*, 656 F.2d 300 (8th Cir. 1981), *vacated*, 458 U.S. 1118 (1982), *on remand*, 693 F.2d 41 (8th Cir. 1982), *cert. denied*, 461 U.S. 927 (1983), in which the Court of Appeals recognized the need for "providing personalized instruction with sufficient support services" for a handicapped child. 693 F.2d at 42. Here, the Seventh Circuit has held that the school district has established a general program with a "proven methodology for facilitating the early primary education of profoundly hearing-impaired children," and that it need not "provide a specific program or employ a specific methodology" to educate Benjamin. (App A, pp. 15a-16a) This approach ignores the EAHCA's requirement of an "individualized" educational program for each handicapped child. Benjamin's parents have never asked the school district to change the teaching methods it uses in its special education classes. They have relied upon Benjamin's proven success in mainstream classes with a particular kind of communication inter-

preter as demonstrating that with "sufficient support services", Benjamin can be educated in a mainstream setting.

In the Sixth or Eighth Circuit, Benjamin would have a right to an individualized IEP providing him with a mainstream education; in the Seventh Circuit, that right is "subsumed" in the general deaf education program established by the schools. The record in this case, as described in the District Court's findings, provides this Court with a clear opportunity to instruct the Courts of Appeals on the correct interpretation and application of the mainstream requirement of the EAHCA.

Conclusion

For these reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

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Appendices

Appendix A

In the
United States Court of Appeals
For the Seventh Circuit

No. 87-2518

RONALD LACHMAN and MARY ANN LACHMAN,
on behalf of BENJAMIN LACHMAN, a minor,

Plaintiffs-Appellants,

v.

ILLINOIS STATE BOARD OF
EDUCATION; EAST MAINE SCHOOL
DISTRICT 63; and MAINE TOWNSHIP
SPECIAL EDUCATION PROGRAM,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 86-C-9250—Prentice H. Marshall, *Judge.*

ARGUED FEBRUARY 11, 1988—DECIDED JULY 18, 1988

Before COFFEY, *Circuit Judge*, RIPPLE, *Circuit Judge*, and ESCHBACH, *Senior Circuit Judge.*

ESCHBACH, *Senior Circuit Judge.* Benjamin Lachman is a profoundly deaf seven-year-old child who resides within the district boundaries of the East Maine, Illinois School District No. 63 ("the school district"). The school district is a member of the Maine Township Special Education Program ("MSTEP") and through MSTEP contracts with Northern Suburban Special Education District to provide services for its hearing-impaired students through a

Regional Hearing Impaired Program ("RHIP"). Since the time Benjamin became eligible for participation in the RHIP pre-school program, in September, 1984, his parents and the school district have disagreed as to the manner in which his education should be facilitated. That disagreement eventually led the Lachmans to initiate this private cause of action as provided for by § 1415(e)(2) of the Education for All Handicapped Children Act, 20 U.S.C. §§ 1401-1420 ("EAHCA" or "the Act").[1]

I

The Lachmans believe that Benjamin can best be educated at a neighborhood school near his home, in a regular classroom with the assistance of a full-time cued speech instructor.[2] In contrast, the school district has consistently proposed that all or at least half of Benjamin's school day be spent in a RHIP self-contained classroom with other

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[1] Appellants' complaint also alleges violations of the Illinois School Code, Ill. Rev. Stat. ch. 122, ¶ 14-8.02 and § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. Appellants did not advance any substantive argument as to either statute before the district court or in their briefs submitted to this Court. The district court did not address either of these two alternate claims. "Collateral allusions to a legal issue do not require the court to decide difficult questions." *Bonds v. Coca Cola Co.*, 806 F.2d 1324, 1328 (7th Cir. 1986), quoted in *Anderson v. Gutschenritter*, 836 F.2d 346, 349 (7th Cir. 1988). "[A]n issue expressly presented for resolution is waived if not developed by argument." *Anderson*, 836 F.2d at 349 (citing *Hunter v. Allis Chalmers*, 797 F.2d 1417, 1430 (7th Cir. 1986)). Because of appellants' failure to offer any substantive argument or case law citation in support of their assertion that a violation of 29 U.S.C. § 794 has transpired, we can only deem that claim to have been waived. Further, because we have before us no additional argument pertaining to the provision of the Illinois School Code cited by appellants, we cannot engage in a separate analysis of the Lachmans' state law claim.

[2] Cued speech is a technique for aiding hearing-impaired persons to understand spoken language. It is used in conjunction with speech (lip) reading and employs eight hand shapes held in four positions close to the mouth to clarify phonetic ambiguities.

hearing-impaired children. Those self-contained classrooms are located in schools outside Benjamin's neighborhood. The placements advocated by the school district have all incorporated components providing that, to varying degrees, Benjamin would be integrated into classes and activities with the non-hearing-impaired children in the regular classrooms at those schools. The course of education recommended by the school district centers on the use of the total communication approach to educating hearing-impaired children, which relies primarily upon sign language as a means of communication. The school district has proposed only interim utilization of the cued speech approach, to the extent necessary to effectively transition Benjamin into the total communication-based program.

In the Spring of 1986, with the approach of Benjamin's enrollment in kindergarten, the controversy between the Lachmans and the school district crystallized. Because the Lachmans did not agree with the Individualized Education Program ("IEP") that the school district proposed for Benjamin, they initiated the due process review procedure established by § 1415 of the Act. The Level I (local level) hearing and the Level II (state educational agency) hearing were conducted. The Level I Impartial Hearing Officer affirmed the school district's recommended placement of Benjamin and the Level II Review Officer upheld that decision.

On November 15, 1986, the Lachmans, as Benjamin's guardians, brought suit on his behalf against the school district, MSTEP and the Illinois State Board of Education. At its core, the complaint alleges that the IEP proposed by the RHIP and the school district, and approved by the Illinois State Board of Education, fails to provide Benjamin with a free appropriate public education as required by § 1412(1) of the EAHCA.[3] The complaint re-

[3] The district court opinion described the final, updated IEP developed by the school district for Benjamin as follows.

(Footnote continued on following page)

quests, *inter alia*, that the defendant/appellees be ordered to educate Benjamin in a local school (*i.e.*, his neighborhood school) with the services of a cued speech instructor. The complaint also asks that defendant/appellees be enjoined from placing Benjamin in a self-contained classroom (with only other hearing-impaired children) and/or requiring him to learn sign language "as a goal of his education."

The district court fashioned its analysis along the lines of the Supreme Court's interpretation, in *Board of Education of the Henderson Hudson Central School District Board of Education, Westchester County v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034 (1982), of the procedural and substantive requirements imposed by the EAHCA. The critical portion of the district court's substantive analysis is set forth below.

> The purpose of the Act was to open the door of public education to handicapped children by means of specialized educational services rather than to guarantee any particular substantive level of education once the child was enrolled. The Act does not require a state to maximize the potential of each child commensurate with the opportunity provided non-handicapped children.

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[3] *continued*

> [The IEP] proposed that Benjamin be placed at Forest View School in a self-contained total communication hearing impaired program at the primary level. An FM auditory training unit would be provided. Benjamin would be mainstreamed with an interpreter in social studies, science, gym and art. He would receive reading and math in the self-contained classroom at an early second grade level. He would receive interpreter services. He would participate in a pilot project in the areas of speech development and introduction of new vocabulary. Cued speech would also be utilized to assist Benjamin in the transition to signed English. Forest View is an integrated K-5 school with 317 students, thirty-five of whom are hearing-impaired.

> In an action such as this a court must first determine whether the responsible agencies have complied with the statutory procedures and then must determine whether the individualized program developed through such procedure is reasonably calculated to enable the child to receive educational benefits. If these requirements are met, the responsible authorities have complied with the obligations imposed by the Act, and the court can require no more.
>
> Courts must avoid imposing their view of preferable educational methods upon the responsible authorities. Once it is shown that the Act's requirements have been met, questions of methodology are for resolution by the responsible authorities.
>
> Clearly, the consultation and procedural requirements of the Act have been met in this case. Careful, impartial consideration has been given to Benjamin's individual educational needs. A full, free appropriate public education has been offered to him. Plaintiffs, because of their and Benjamin's success with cued speech, assert, with support from their experts, that it is the proper methodology by which Benjamin should be educated. But defendants' experts give equal credence to total communication.
>
> Defendants must provide a free appropriate public education for all of the handicapped children in their particular district. They have done so. Plaintiffs are not entitled to have defendants provide a separate educational opportunity for Benjamin.

Based on the foregoing analysis, the district dismissed the Lachmans' complaint. They appeal from that dismissal.

II

It is well established that in reviewing the outcomes reached through the §§ 1415(b) and (c) administrative appeals procedure, a district court is to make an independent decision as to whether the requirements of the Act

have been satisfied. That decision is to be based on a preponderance of the evidence, giving due weight to the results of those state administrative proceedings. 20 U.S.C. § 1415(e)(2). *See School Board of the County of Prince William, Virginia v. Malone*, 762 F.2d 1210, 1218 (4th Cir. 1985) (citing *Rowley*, 458 U.S. at 205, 102 S. Ct. at 3051). *See also Doe v. Maher*, 793 F.2d 1470, 1492-93 (9th Cir. 1986); *Bonadonna v. Copperman*, 619 F. Supp. 401, 407-08 (D.N.J. 1985); *Flavin v. Connecticut State Board of Education*, 553 F. Supp. 827, 831 (D. Conn. 1982). The district court's determination that the IEP proposed for Benjamin by the school district constituted a free appropriate public education as required by the EAHCA is founded on its application of the relevant provisions of the Act to the facts attendant to Benjamin's circumstance. We review the determination of that mixed question of law and fact *de novo*. *See Bryan v. Warden, Indiana State Reformatory*, 820 F.2d 217, 220 (7th Cir. 1987); *United States ex rel. Shaw v. De Robertis*, 755 F.2d 1279, 1282 n.2 (7th Cir. 1985); *United States ex rel. v. George*, 687 F.2d 1012, 1015 (7th Cir. 1982). *See also Gregory v. Longview School District*, 811 F.2d 1307, 1310 (9th Cir. 1987) ("whether the school district's proposed IEP was a 'free appropriate public education' as required by the Education for All Handicapped Children Act is a mixed question that we review *de novo*"); *Wilson v. Marana Unified School District No. 6 of Pima County*, 735 F.2d 1178, 1181 (9th Cir. 1984).

The district court correctly ascertained that *Rowley, supra*, is the definitive Supreme Court pronouncement to date as to the standards a school district must meet in order to satisfy its § 1412(1) obligation to provide all handicapped students with a free appropriate public education. In *Rowley*, the Court directed the lower courts to engage in the following two-part inquiry in suits, like the present one, brought under § 1415 (e)(2) of the Act.

> First, [the court must inquire whether] the State has complied with the procedures set forth in the Act[.] And second, [the court must ask] is the indi-

> vidualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.

458 U.S. at 207, 102 S.Ct. at 3051 (footnotes omitted). Appellants do not contend that the appellee education officials failed to comply with the procedures set forth in the Act.[4] Accordingly, we need not address the first part of the *Rowley* test. In determining whether the IEP proposed by the school district secures to Benjamin the right to a free appropriate free public education guaranteed him by § 1412(1) of the Act, our analysis will be limited to the second *Rowley* inquiry.

III

Examination of the district court opinion reveals that it considered the focal point of the disagreement between the Lachmans and the school district to be a question of whether Benjamin's education can best be facilitated by utilization of the cued speech technique or the total communication concept. The Lachmans dispute that inference by the district court. They perceive that the outcome-determinative question in this case is whether the challenged IEP fails to satisfy the Act's § 1412(5) requirement that "to the maximum extent appropriate" Benjamin, as a handicapped child, be "educated with children who are not handicapped," and that he be removed from the regular classroom environment and placed in a special class only to the extent that "the nature or severity of [his] handicap is such that education in regular classes with

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[4] In their initial brief, appellants make reference to the degree of parental involvement permitted them by the school district during the course of the proceedings that resulted in the formulation of Benjamin's IEP. They do not allege that a violation of the Act transpired as a result of the school district's actions in this regard.

the use of supplementary aids and services cannot be achieved satisfactorily." 20 U.S.C. § 1412(5)(B).[5]

In *Rowley*, the Supreme Court was not directly confronted with a claim that the § 1412(5)(B) mainstreaming goal had not been satisfied. In that opinion, the Court made only a passing reference to the "preference" for mainstreaming handicapped children reflected in § 1412(5)(B) of the Act. *Rowley*, 485 U.S. at 202-03, 102 S. Ct. at 3049. Thus, the Lachmans claim that the district court erred because, in applying the *Rowley* test for satisfaction of the Act's general (§ 1412(1)) requirement that Benjamin be provided a free appropriate public education, it failed to adequately address the issues raised by the § 1412(5)(B) preference for mainstreaming handicapped children. *See Rowley*, 485 U.S. at 202-03, 102 S. Ct. at 3049. *See also Springdale School District #50 of Washington County v. Grace*, 693 F.2d 41, 43 (8th Cir. 1982), *cert. denied*, 461 U.S. 927, 103 S. Ct. 2086 (1983).

The district court opinion is carefully drawn and fully addresses the components of the *Rowley* test for compliance with the general, overriding requirement of the EAHCA, imposed by § 1412(1), that Benjamin Lachman be provided with a free appropriate public education. However, because it believed the real point of contention between the Lachmans and the school district to be a disagreement as to which of two communication methodologies should be used to facilitate Benjamin's early primary education, the district court engaged in a prototypal *Rowley* analysis, devoting only one paragraph to the issue of mainstreaming. That paragraph concludes with the ob-

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[5] Appellants also cite to the regulations of the Office of Special Education and Rehabilitative Services, Department of Education, 34 C.F.R. §§ 300.550-556, promulgated under the authority of 20 U.S.C. § 1412(5)(B). Those regulations are intended to ensure that the states satisfy the mainstreaming preference articulated by § 1412(5)(B) by providing for the education of handicapped children in the least restrictive environment possible.

servation that under the proposed IEP "Benjamin will be completely mainstreamed in a short period of time."

Rowley makes clear that "once a court determines that the requirements of the Act have been met, questions of methodology are for resolution by the State." 458 U.S. at 208, 102 S. Ct. at 3052. The mainstreaming preference articulated in § 1412(5)(B) is one of the "requirements of the Act" referred to in the above excerpt from *Rowley*. Because the parties' disagreement as to the extent to which Benjamin is to be mainstreamed is inexorably intertwined with their disagreement as to the choice between the cued speech and total communication methodologies, we must first ascertain which of those issues, if any, predominates here.

In order to divine the true crux of the dispute that prompted the present cause of action, we must establish the nature of the mainstreaming obligation created by § 1412(5)(B) and clarify the relationship of that statutory language to the general § 1412(1) requirement that handicapped children be provided with a free appropriate public education. Several post-*Rowley* decisions by the U.S. Courts of Appeals for the Sixth, Eighth and Ninth Circuits, as well as a small number of reported district court opinions, have addressed this topic.

In *Roncker v. Walter*, 700 F.2d 1058 (6th Cir.), *cert. denied*, 464 U.S. 864, 104 S. Ct. 196 (1983), the Sixth Circuit observed that:

> The Act does not require mainstreaming in every case but its requirement that mainstreaming be provided to the *maximum* extent appropriate indicates a very strong congressional preference. The proper inquiry is whether a proposed placement is appropriate under the Act. In some cases, a placement which may be considered better for academic reasons may not be appropriate because of the failure to provide for mainstreaming.

Id. at 1063 (footnote omitted). The court in *Roncker* next identified the question of "whether the services which

make the segregated placement superior can be feasibly provided in a non-segregated setting" as the key to determining if a proposed segregated placement is inappropriate under the Act. *Id.* at 1063. If those services can feasibly be provided in a non-segregated setting, the *Roncker* court stated it would deem the segregated placement inappropriate under the Act. Also relevant to our analysis is the observation in *Roncker* that the Act's "strong preference" for mainstreaming must be balanced against "the possibility that some handicapped children simply must be educated in segregated facilities either because . . . any marginal benefits from mainstreaming are far outweighed by the benefits gained from services which could not feasibly be provided in the non-segregated setting." *Id.*[6]

The remainder of the relevant reported case law pertaining to § 1412(5)(B) reflects a perception that the mainstreaming preference the statutory provision creates was not meant by Congress to be implemented in an unqualified manner. Instead, it is clear that the courts considering this issue have determined that the Act's mainstreaming preference is to be given effect only when it is clear that the education of the particular handicapped child can be achieved satisfactorily in the type of mainstream environment sought by the challengers to the IEP proposed for that child. *See A.W. v. Northwest R-1 School District*, 813 F.2d 158, 163 (8th Cir.), *cert. denied*, 108 S. Ct. 144 (1987) (holding that § 1412(5) "significantly qualifies the mainstreaming requirement by stating that it should be implemented 'to the maximum extent appropriate,' and

[6] *Roncker* also cites the cost of providing the services necessary to facilitate the education of a handicapped child in a non-segregated environment as a relevant consideration in determining whether, in a particular case, the Act's mainstreaming preference has been satisfied. *Roncker on Behalf of Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir. 1983). The school district has not raised cost as a defense here. Therefore, we need not consider that factor in our analysis.

that it is inapplicable where education in a mainstream environment 'cannot be achieved satisfactorily.' ") *See also Mark v. Grant Wood Area Education Agency*, 795 F.2d 52, 54 (8th Cir. 1986), *cert. denied*, 107 S. Ct. 1579 (1987) (rejecting "the view that the mainstreaming provisions of the Act are satisfied only if a handicapped child is educated in the same classroom with non-handicapped children"); *Maher*, 793 F.2d at 1483 ("the EAHCA does not compel localities to place handicapped students in regular education classes, but only in the least restrictive setting consistent with their needs and those of other students."); *Johnston by Johnston v. Ann Arbor Public Schools*, 569 F. Supp. 1502, 1508-09 (E.D. Mich. 1983) (finding no violation of the Act's mainstreaming goal where the transfer of a handicapped child from a regular classroom to a special education classroom was necessary and appropriate); *Taylor v. Board of Education of Copake-Taconic Hills Central School District*, 649 F. Supp. 1253, 1258 (N.D. N.Y. 1986) ("in some instances, a special facility will constitute the least restrictive environment for a particular handicapped child").

We are convinced that appellants' effort to characterize the sole, true issue in this case as whether the proposed IEP satisfies the § 1412(5)(B) mainstreaming preference is misdirected. Undoubtedly, this case does present a valid question of whether the IEP proposed by the school district and affirmed by the Illinois State Board of Education would result in Benjamin being mainstreamed to the "maximum extent appropriate" as contemplated by § 1412(5)(B). However, on careful examination, it becomes apparent that a determination of whether the IEP proposed for Benjamin provides for mainstreaming to the maximum extent appropriate can be made only within the context of the methodology employed to facilitate his education.

The degree to which a challenged IEP satisfies the mainstreaming goal of the EAHCA simply cannot be evaluated in the abstract. Rather, that laudable policy objective must be weighed in tandem with the Act's principal goal of ensuring that the public schools provide handi-

capped children with a free appropriate education. *See Wilson*, 735 F.2d at 1183. A major part of the task of local and state officials in fashioning what they believe to be an effective program for the education of a handicapped child is the selection of the methodology or methodologies that will be employed. "The primary responsibility for formulating the education to be accorded a handicapped child, *and for choosing the educational method most suitable to the child's needs*, was left by the Act to state and local educational agencies in cooperation with the parents or guardians of the child." *Rowley*, 458 U.S. at 207, 102 S. Ct. at 3051 (emphasis supplied) quoted in *Northwest R-1 School District*, 813 F.2d at 164.

The Lachmans' contention that their son can be fully mainstreamed rests squarely on their belief in, and preference for, the cued speech technique. They do not maintain that the fully-mainstreamed placement they seek would be possible without the use of cued speech and the utilization of a cued speech instructor working at Benjamin's side, full-time, in the classroom. Further, appellants do not claim that Benjamin could be mainstreamed to any greater extent than called for in the proposed IEP, if the total communication methodology is utilized.[7] The reasons

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[7] Appellants' contention that the IEP proposed for their son by the school district reflects a philosophical disagreement with the mainstreaming objective of § 1412(5)(B) is not supported by the evidence. The challenged IEP calls for Benjamin to be placed in a regular classroom, fully-mainstreamed environment for approximately half or nearly half of the school day. During the time he is not fully mainstreamed, Benjamin is to be placed in a self-contained classroom within a regular school. The Act's preference for mainstreaming does not require that a school district reject intermediate degrees of mainstreaming when such a placement is otherwise justified by a handicapped child's educational needs. *See Wilson v. Marana School District No. 6 of Pima County*, 735 F.2d 1178, 1183 (9th Cir. 1984). Here, the school district's unwillingness to fully mainstream Benjamin at this time rests squarely on its policy determination that, at the current time, his education can best be facilitated through use of the total communication methodology.

relied on by the school district for refusing to place Benjamin in a regular classroom full-time focus on its lack of confidence in the cued speech technique as a means for facilitating immediate, full mainstreaming in Benjamin's case. Instead, the school district believes that the total communication concept is the most appropriate way to facilitate Benjamin's early primary education and it has selected that methodology for his IEP.

On the facts of this case, it is clear that the § 1412(5)(B) issue of mainstreaming is subsumed by the parties' disagreement as to methodology. In the absence of the parties' difference of opinion as to that question of educational methodology, there would be no disagreement between them as to the extent of mainstreaming that could presently be achieved for Benjamin. Given the nature of the disagreement between the parties and the concomitant thrust of the Lachmans' cause of action, we can only conclude that the district court did not err when it framed its substantive analysis in a manner closely tracking the *Rowley* opinion, without expressly addressing the § 1412(5)(B) mainstreaming issue.

IV

We have determined that the core, dispositive issue in the controversy that underlies this cause of action is one centering on a disagreement between appellant parents and appellee school district as to the most appropriate method whereby the education of the parents' handicapped child is to be facilitated. Accordingly, in reviewing the decision of the court below, we, like the district court, must take great care to avoid displacing the educational policy judgments made by appellees. That substantial deference to the decisions of those state and local public education officials is warranted here is confirmed by the statements of the Supreme Court in Rowley as to the role of the courts under the EAHCA in reviewing the decisions made by state and local public education officials.

> In assuring that the requirements of the Act have been met, courts must be careful to avoid imposing their view of preferable education methods upon the States. The primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs, was left by the Act to state and local educational agencies in cooperation with the parents and guardians of the child. . . . [I]t seems highly unlikely that that Congress intended courts to overturn a State's choice of appropriate educational theories in a proceeding brought pursuant to § 1415(e)(2).
>
> We previously have cautioned that courts lack the "specialized knowledge and experience" necessary to resolve "persistent and difficult questions of educational policy." We think Congress shared that view when it passed the Act. . . . Therefore, once a court determines that the requirements of the Act have been met, questions of methodology are for resolution by the States.

Rowley, 458 U.S. at 207-08, 102 S. Ct. at 3052-53 (citation omitted). *See also Hudson v. Wilson*, 828 F.2d 1059, 1063 (4th Cir. 1987); *Northwest R-1 School District*, 813 F.2d at 164; *Gregory*, 811 F.2d at 1311; *Rettig v. Kent City School District*, 720 F.2d 463, 466 (6th Cir. 1984), *cert. denied*, 466 U.S. 1201, 104 S. Ct. 2379 (1984).

The district court expressly found that defendant/appellee education officials had complied with the Act. Our review leads us to the same conclusion. *Rowley* and its progeny leave no doubt that parents, no matter how well-motivated, do not have a right under the EAHCA to compel a school district to provide a specific program or employ a specific methodology in providing for the education of their handicapped child. *See Rowley*, 458 U.S. at 207, 102 S. Ct. at 3051. *See also Wilson*, 735 F.2d at 1178, 1182 (the states "have the power to provide handicapped children with an education they consider more appropriate than that proposed by the parents."); *Northwest R-1 School District*, 813 F.2d at 164; *Gregory*, 811 F.2d at

1311; *Rettig*, 720 F.2d at 466; *Springdale School District #50*, 693 F.2d at 43. It is clear that the IEP proposed by the school district is based upon an accepted, proven methodology for facilitating the early primary education of profoundly hearing-impaired children. Further, nothing in the record indicates that the proposed IEP does not provide that Benjamin will be educated in a regular classroom environment to the maximum extent appropriate as required by § 1412(5)(B) of the Act. Given these findings, we conclude that the proposed IEP will provide Benjamin Lachman with a free appropriate public education as required by § 1412(1) of the Act. Accordingly, the judgment of the district court is AFFIRMED.[8]

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

[8] In the district court, appellee MTSEP moved to dismiss appellants' complaint against it for failure to state a claim. MSTEP alleged that the complaint did not establish that it owed a duty to appellants. Therefore it claimed not to be a proper party defendant. The district court denied the motion, holding MSTEP had not met its burden of proving that it was "non-suable." MSTEP appeals that action by the district court. Given our disposition of this case, we need not address this argument by MSTEP.

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Appendix B

IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois

Eastern Division

RONALD AND MARY LOU LACHMAN as Guardians for BENJAMIN LACHMAN, a minor, *Plaintiffs,* v. ILLINOIS STATE BOARD OF EDUCATION; EAST MAINE SCHOOL DISTRICT 63; MAINE TOWNSHIP SPECIAL EDUCATION PROGRAM, *Defendants.*	No. 86 C 9250

MEMORANDUM OPINION

PRENTICE H. MARSHALL, *District Judge*

This is an action brought pursuant to the Education of the Handicapped Act, 20 U.S.C. §§ 1401 *et seq.* (1982 & 1987 West Supp.) by Ronald and Mary Ann Lachman as guardians for Benjamin Lachman, a minor, in which plaintiffs challenge the free appropriate public education which has been offered to Benjamin by defendants. In *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982), the Supreme Court considered the substantive and procedural requirements of the Act and the role of a district court in entertaining an action such as this one. For the reasons hereinafter stated, we hold that plaintiffs are not entitled to the relief

which they seek and that a judgment should be entered dismissing their action. This memorandum will serve as our findings of fact and action. This memorandum will serve as our findings of fact and conclusions of law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure.

Benjamin Lachman was born September 2, 1981. When he was ten months old, his parents (the plaintiffs) discovered that he is profoundly deaf. Shortly after they discovered Benjamin's deafness, his parents enrolled in the parent-infant education service offered by the Regional Hearing Impaired Program (RHIP), the contractor for teaching deaf children in the East Maine School District. The RHIP used "total communication" which is a method of communication using principally sign language, finger spelling and simultaneous talking. In May 1983, Benjamin began speech and language therapy in which he used a total communication methodology.

Plaintiffs became frustrated with this methodology. A part of their frustration stemmed from the fact that there was an obvious difference between Benjamin's language skills and the skills of hearing children. Another part stemmed from the fact that Benjamin's father, Ronald, had difficulty learning or adapting to sign language.

Plaintiffs took Benjamin to the Central Institute for the Deaf to obtain an independent professional opinion. The test showed that Benjamin's skills lagged significantly in comparison with those of hearing children.

Plaintiffs investigated other methods of communication. They learned from a RHIP program teacher of a method known as cued speech, which visually demonstrates all sounds used in spoken English. It enhances lip reading by using eight hand shapes in four positions close

to the face to clarify phonic ambiguities. Plaintiffs attended a workshop on cued speech. They began using cued speech in the home with Benjamin. They became proficient and gradually discontinued the use of sign language in the home.

After about eight months, Benjamin returned to the Central Institute for the Deaf for further testing and evaluation. He showed marked improvement in language comprehension. And in a third testing session when he was three years old, Benjamin had approached, and in some cases exceeded, the comprehension level of children with normal hearing.

In February 1986, after Benjamin had been using cued speech for two and one-half years, he was tested at the Boys Town National Institute for Communication Disorders in Children (Boys Town) in Omaha, Nebraska. The test results showed that he had superior nonverbal intellectual abilities and strengths in receptive and expressive vocabulary development. Boys Town recommended that Benjamin continue to use cued speech.

When Benjamin was three years old he was enrolled in a Montessori preschool with hearing children. His parents employed and trained a cued speech interpreter who accompanied Benjamin to school. He was very successful in the Montessori program. His teacher, Mrs. Bleuer, testified that he was able to handle the regular curriculum in the Montessori class and did as well as most of his hearing classmates.

In September 1984, Benjamin became eligible for the preschool regional hearing impaired program. In August a case study analysis was performed in which it was recommended that he be enrolled in a self-contained deaf program at the pre-school level using total communication. Plaintiffs rejected the program because it did

not include cued speech and did not mainstream Benjamin. Instead, they enrolled him in the Children's Learning World in Park Ridge, a private school.

In the fall of 1985, plaintiffs requested a reevaluation of Benjamin's special education needs. A reevaluation was performed and it was again concluded that he should be placed in a self-contained program using total communication. Again, plaintiffs disagreed and re-enrolled him in the Children's Learning World.

In the spring of 1986, as Benjamin was approaching school age, plaintiffs met with representatives of the East Maine School District and requested that Benjamin be permitted, in the fall of 1986, to attend Nelson School (which is his neighborhood school) in a regular kindergarten class with a cued speech interpreter. The school district agreed with the request provided Benjamin also attend a total communication program for the other half of the day at Sherwood School. This condition was rejected by plaintiffs because sign language was not, in their opinion, an appropriate goal for Benjamin.

Plaintiffs then initiated the due process review procedure mandated by the Act, under which an administrative evidentiary hearing is held to inquire into the appropriateness of the proposed IEP. 20 U.S.C. § 1415.

In accord with the requirements of the Act, an impartial due process hearing was held on June 20, 1986. On June 7, 1986, the hearing officer affirmed the District's recommended placement of Benjamin for the 1986-87 academic year. On September 16, 1986, a level two due process hearing was held. On October 29, 1986, the level one decision was sustained.

On November 15, 1986, plaintiffs brought this action seeking an order compelling defendants to enroll Benjamin in the Nelson School with a cued speech interpreter.

In January 1987, plaintiffs and the East Maine School District No. 63 entered into an agreement to reevaluate Benjamin. He was enrolled for four weeks in the Nelson School with a cued speech interpreter. The purpose was to gather sufficient information for an updated individual education program for him.

On March 27, 1987, an updated IEP was established. It proposed that Benjamin be placed at Forest View School in a self-contained total communication hearing impaired program at the primary level. An FM auditory training unit would be provided. Benjamin would be mainstreamed with an interpreter in social studies, science, gym and art. He would receive reading and math in the self-contained classroom at an early second grade level. He would receive interpreter services. He would participate in a pilot project in the areas of speech development and introduction of new vocabulary. Cued speech would also be utilized to assist Benjamin in the transition to signed English. Forest View is an integrated K-5 school with 317 students, thirty-five of whom are hearing-impaired.

Plaintiffs then sought a preliminary injunction seeking to bar an alteration of Benjamin's placement at Nelson School. The hearing on the preliminary injunction was consolidated with the trial on the merits. Rule 65, F.R. Civ. P. By agreement, Benjamin was permitted to complete the spring 1987 semester at Nelson. His educational future awaits this decision.

The RHIP for students aged three to twelve exists at two sites. One is located at Forest View School where, it is proposed, Benjamin be enrolled. Forest View is a school of approximately 317 K-5 students of whom thirty-five are hearing impaired. The other program is at the Sherwood School located in Highland Park, which is a K-5 school of approximately 276 students of whom forty are hearing impaired.

Each of these schools provides a self-contained instructional program for the hearing impaired. Each program includes mainstreaming into the regular school program for gym and art and academic courses based on the individual educational program of the particular student. Each site provides supportive services for speech and language and interpreters. The academic program is integrated with a structured language program to enhance and develop the communications skills and needs of the hearing impaired. Language is taught as a part of all school subjects, not apart from other school subjects, and is an all day every day program to be correlated and integrated with all other school subjects. The methodology of instruction is total communication.

The RHIP program includes manually coded English, speech development, auditory training and speech training. A pilot project uses cued speech as a tool for implementing speech development in the introduction of new vocabulary. The value of cued speech is in the process of being assessed. The program also utilizes lip reading and auditory training as well as the use of receptive, residual hearing through itinerant services, speech, exact sign and finger spelling.

Forty-seven school districts receive services from RHIP, including East Maine School District No. 63, which is the district which provides Benjamin his public education. The RHIP is regarded as one of the best in the country.

Benjamin's kindergarten teacher at Nelson School testified with regard to his four weeks at Nelson. His reading readiness, math and science concepts are at the level of his peers. He works well with other children, shares materials and is not a disruptive influence in the class. He has made positive progress in his interaction

with other students. He usually gives the correct response in learning/teaching situations and he seems interested in all classroom activities. Benjamin is meeting academic expectations and is making social progress in the classroom.

In February 1987, a speech language evaluation was made of Benjamin as well as an evaluation of his socio-emotional functioning. The academic evaluation indicated a high average receptive language ability with above average expressive vocabulary. The understandability of his speech was poor to the unfamiliar listener, but this was enhanced when contextual cues were available.

The psychologists saw no indication of any significant socio-emotional stress or pathology, reporting that Benjamin is a boy who is happy and satisfied with himself and with his capacities and his relationships to others within his environment.

The expert testimony at trial conflicted on the question of cued speech versus total communication. Cued speech has worked well with Benjamin. But under the individual educational program he will continue to have access to it. On the other hand, total communication teaches him a method of communication most commonly used by the hearing impaired.

Benjamin has been totally mainstreamed at Nelson School. The mainstreaming at Forest View will be less, at the outset. But it is anticipated that Benjamin will be completely mainstreamed within a short period of time.

In *Board of Education of Hendrick Hudson Central School District v. Rowley, 458 U.S. at 189*, the Court concluded that the requirement of the Education of the Handicapped Act of a "free appropriate public education" is satisfied when the state authorities provide personalized instruction with sufficient support services to permit the

handicapped child to benefit educationally from the instruction. The instruction must comport with the child's IEP as formulated in accordance with the Act's consultation and due process requirements.

The purpose of the Act was to open the door of public education to handicapped children by means of specialized educational services rather than to guarantee any particular substantive level of education once the child was enrolled. The Act does not require a state to maximize the potential of each child commensurate with the opportunity provided non-handicapped children.

In an action such as this a court must first determine whether the responsible agencies have complied with the statutory procedures and then must determine whether the individualized program developed through such procedures is reasonably calculated to enable the child to receive educational benefits. If these requirements are met, the responsible authorities have complied with the obligations imposed by the Act, and the court can require no more.

Courts must avoid imposing their view of preferable educational methods upon the responsible authorities. Once it is shown that the Act's requirements have been met, questions of methodology are for resolution by the responsible authorities.

Clearly, the consultation and procedural requirements of the Act have been met in this case. Careful, impartial consideration has been given to Benjamin's individual educational needs. A full, free, appropriate public education has been offered to him. Plaintiffs, because of their and Benjamin's success with cued speech, assert, with support from their experts, that that is the proper methodology by which Benjamin should be educated. But defendants' experts give equal credence to total communication.

Defendants must provide a free appropriate public education for all of the handicapped children in their particular district. They have done so. Plaintiffs are not entitled to have defendants provide a separate educational opportunity for Benjamin.

Defendants have complied with the Act. Plaintiffs' options are to accept the individualized educational program which has been tendered to Benjamin or to provide him, at their own expense, with a private education.

Judgment will enter dismissing plaintiffs' complaint.

ENTER:

/s/ PRENTICE H. MARSHALL
Prentice H. Marshall
United States District Judge

DATED: August 31, 1987.

Appendix C

Received Jul 14, 1986

SETH B. HARKINS
Level I Impartial Due Process Hearing Officer
721 Dobson
Evanston, Illinois 60202
475-1606

July 7, 1986

CERTIFIED MAIL #P 245 682 243
#P 245 682 244

CONFIDENTIAL

Mr. Ron and Mrs. Mary Ann Lachman
7702 West Davis
Morton Grove, IL 60053

Dr. Donald E. Bond
Superintendent
East Maine School District 63
c/o Mrs. Joyce Christiansen
Director
Maine Township Special Education Program
1131 South Dee Road
Park Ridge, IL 60028

Dear Mr. and Mrs. Lachman and Superintendent Bond:

RE: LEVEL I IMPARTIAL DUE PROCESS HEARING DECISION LETTER ON BEHALF OF BENJAMIN LACHMAN

On June 20, 1986, a Level I impartial due process hearing was convened at 8:00 a.m. at the Maine Township Special Education Program (MTSEP) administration office, 1131 South Dee Road, Park Ridge, Illinois, on behalf of Benjamin Lachman. The hearing officer has jurisdiction to

hear and decide this matter under Section 14-8.02(g) of *The School Code of Illinois*, 34 CFR 300.509 of the PL 94-142 Regulations, and *23 Illinois Administration Code*, 226 Subpart J.

The parties were informed of their rights and responsibilities under Section 14-8.02(g) of *The School Code*, 34 CFR 300.508, and *23 Illinois Administrative Code*, 226 Subpart J. Attending the hearing for the parents and the district on behalf of Benjamin Lachman were:

Mr. Ron Lachman, Parent
Mrs. Mary Ann Lachman, Parent
Mr. Richard Rhodes, Attorney
Mrs. Judith Rhodes, Grandparent
Mrs. Ann Bleuer, Director, Cueing Place
Dr. Elaine S. Dunne, Speech/Language Pathologist
Mr. Brent Brunetta, Friend of the Lachman Family
Ms. Catherine R. Bieber, Speech/Language Pathologist
Mrs. Joyce Christiansen, Director, MTSEP
Mrs. Dorothy Eulass, Program Director, RHIP
Mr. Mike Johann, Director, LICA
Mrs. Jacqueline Kimel, Program Coordinator, RHIP
Ms. Kathleen Hart, Speech/Language Diagnostician, RHIP
Ms. Jean Boyer, School Psychologist, RHIP
Ms. Linda McEllaney, Teacher Consultant, RHIP
Mr. Leo Athas, Attorney
Ms. Bonnie Rodin-Olin, Parent Infant Educator, RHIP
Dr. Robert Rittenhouse, Expert Witness

This hearing was requested by Mr. and Mrs. Lachman on May 5, 1986. The hearing was initially scheduled for June 18, but was rescheduled for June 20, at the request of the parents' attorney. Mr. and Mrs. Lachman requested that the hearing be open.

There were five things that affected the conduct of the hearing. First, the hearing was held within the time parameters established in 226.632. Second, the hearing was recessed at 12:15 p.m. on June 20, and reconvened at 8:00 a.m. on July 3. Third, the hearing officer reviewed his duties under 226.622. The hearing officer discussed the fact that the Regional Hearing Impaired Program (RHIP) is administered by the Northern Suburban Special Education District (NSSED) and that the hearing officer is employed by a school district which belongs to NSSED. The hearing officer noted that he was not employed by either NSSED nor RHIP. He indicated that he would withdraw as the hearing officer if either party felt his professional associations would color his decision-making responsibilities. The district and the parents affirmed that the hearing officer was impartial. Fourth, on July 3, Mr. and Mrs. Lachman requested an additional recess in the hearing to accommodate an expert witness from Boys Town National Institute for Communication. The request was refused on the grounds that it was untimely and the expert witness would merely amplify the Boys Town evaluation contained in the district's and parents' evidence packets. The hearing officer advised the parties that he would seek said testimony under 226.640.a(3) if he determined that it was essential to his decision making. It was not the hearing officer's impression that additional testimony was necessary. Fifth, the evidence submitted was substantial and was thoroughly reviewed by the hearing officer prior to the hearing.

A. BACKGROUND

Benjamin Lachman is 4.10 years of age. At ten months he was evaluated at Children's Memorial Hospital and found to have a severe-to-profound bilateral sensorineural hearing impairment. This diagnosis was confirmed as profound by brainstem evoked audiometry at Mercy Hospital in July, 1983.

Following this diagnosis, Mr. and Mrs. Lachman embarked on a course of self-education. They enrolled in the RHIP Parent Infant Education Program and for approximately a year employed a total communication approach with their son. In August, 1983, Mr. and Mrs. Lachman attended a cued speech workshop at Gallaudet College in Washington, D.C. Cued speech is a communication tool consisting of eight hand configurations and four locators on the face and neck which supplements the incomplete visual information available to a speech reader. As a result of this experience, the parents believed that this was superior to a total communication approach because, in their view, cued speech facilitated a phonetic understanding of speech. In the Lachman's opinion, this is important because they believe that reading skills are better enhanced through this method.

Mr. and Mrs. Lachman became proficient in cued speech and have raised Benjamin to communicate via this approach. As proponents of this method, the parents have sought consultations from a wide variety of experts. When Benjamin was almost three years, the parents consented to a case study evaluation (CSE). In August of 1984, the RHIP conducted a case study evaluation, and a multidisciplinary staff conference (MDSC) was held on September 17, 1984, to consider the results of the CSE. Benjamin was declared eligible for special education but an Individual Education Program (IEP) was not formu-

lated because the parents objected to the proposed placement at Wilmont School in Deerfield, Illinois. Mr. and Mrs. Lachman objected to the placement because it employed a total communication approach. At that time, Mr. and Mrs. Lachman proposed a preschool program that included integrating Benjamin into a standard preschool program with a cueing interpreter, speech therapy and auditory training with cueing thirty minutes per day, and transportation to and from the public school for speech therapy. While objecting to the placement, Mr. and Mrs. Lachman did not exercise their right to seek a due process hearing. Rather, they privately sponsored a cueing interpreter and enrolled Benjamin in a Montessori preschool program at Children's Learning World in Park Ridge. Benjamin has attended this program since that time. This is a standard preschool program that includes hearing impaired children who employ cued speech.

On November 11, 1985, Mr. and Mrs. Lachman consented to a second CSE. This CSE was conducted on November 15 and 18, and was reviewed by the RHIP multidisciplinary team on November 26. Benjamin was again seen as eligible for special education. As part of the recommendations, Mr. and Mrs. Lachman agreed to visit RHIP programs and provide the district with additional information about Benjamin's educational needs. On January 27, the MDSC begun on November 26, was reconvened. At this time, the parents sought district sponsorship of Benjamin's placement at Children's Learning World. Because this program was not approved by the Illinois State Board of Education, the district was precluded from considering it as an appropriate placement.

Since the parents and the district were in disagreement over Benjamin's educational needs, they agreed to have independent evaluations conducted. Mr. and Mrs. Lach-

man disapproved of the district's recommendation of an evaluation by the Siegel Institute at Michael Reese Hospital. In their view, Boys Town Center for Communication was appropriate. The district agreed to sponsor both evaluations. The results of these evaluations were reviewed at an April 18, 1986, MDSC. It was here that the conflict between the parents and the district became crystallized. Mr. and Mrs. Lachman opposed the IEP developed by the district because they objected to a total communication program and consider manual sign language as inappropriate for Benjamin. In the parents' view, Benjamin would be denied a free appropriate public education were he unable to access a standard kindergarten through cued speech interpretation, daily speech/language therapy, and part time placement in the Cueing Place at Children's Learning World. The district held that it had an appropriate program within its continuum of services. As a result, Mr. and Mrs. Lachman requested a due process hearing on May 5.

B. FINDINGS OF FACT/CONCLUSIONS OF LAW

On the basis of the written evidence and oral testimony reviewed, and in accordance with 226.640.b (1-5) this hearing officer finds the following facts and makes the following conclusions of law:

1. Does the child have needs which require special education intervention?

   Neither party disputes Benjamin Lachman's need for special education intervention.

2. Were the evaluation procedures utilized in determining the child's needs appropriate in nature and degree?

   District 63 conducted two CSEs and sponsored two outside evaluations. Mr. and Mrs. Lachman procured

a number of independent evaluations. 226.515 (Case Study Evaluation Process), 226.525 (Parental Consent for Case Study Evaluation), 226.532 (Determination of Communication Mode and Cultural Background), 226.535 (Case Study Evaluation Components), 226.540 (Case Study to be Nondiscriminatory) have been satisfied. In terms of 34 CFR 300 Public Law 94-142 regulations, the district satisfied the requirements of 300.531 and 300.532. There was nothing in the record that would indicate that any unusual or noncustomary evaluation procedures were utilized in determining Benjamin Lachman's special education needs.

3. Is the diagnostic profile of the child on which the placement recommendation was based substantially verified?

The verification of the diagnostic profile relates directly to 226.550 (Formulation of Program and Service Options), 226.552 (Characteristics Determining Eligibility for Special Education), 226.540 (Use of Outside Evaluation), 226.555 (Recommendations for Special Education Placement), 226.558 (Results and Recommendations to be in Writing), and 226.560 (Placement Recommendations and Development of IEP). In terms of 34 CFR 300 of the Public Law 94-142 Regulations, the verification of the diagnostic profile relates to 300.533 (Placement Procedures), 300.534 (Reevaluation), and 300.503 (Independent Evaluation). It is found that district 63 complied with the above regulations. It is further found that the district appropriately considered independent evaluations. It is noted that the district did not consider the May, 1986, independent evaluation by Dr. Ling because it had not been made available to the district until the evidence packets were submitted five days

prior to the due process hearing. Importantly, the district was not required to concur with said evaluations, but was required to give consideration to them in the light of the total information available regarding Benjamin Lachman. The district's sponsorship of two independent evaluations constituted actions above and beyond the requirements of 226.540 and 34 CFR 300.503. Furthermore, the record is clear that qualified professionals constituted the MDSC as required under 226.560.b & c (Placement Recommendation and Development of IEP) and 34 CFR 300.533.a (2 & 3).

4. Is the proposed placement directly related to the child's needs?

Throughout this case, the district and the parents have agreed that Benjamin Lachman has needs which require special education intervention. Where they part ways is over the intensity of special education instruction, educationally related services, and the methodologies employed in educating Benjamin. It is clear that the district and the parents have been locked into a power struggle over this issue since Benjamin came to the district's attention in 1983. Mr. and Mrs. Lachman argued that the district failed to give sufficient weight to their independent evaluations because the district is opposed to cued speech. The district, on the other hand, held that it is required by law to provide an appropriate educational program and is willing to incorporate cued speech into Benjamin's program. What is significant here is whether the district discharged its responsibilities under 226.550 and 226.555 and 34 CFR 300.45 (Parent Participation). These regulations charge the local education agency with providing the parents of

handicapped children with an opportunity for input into the MDSC and IEP development.

The decision regarding special education eligibility and placement is a consensus decision. Mr. and Mrs. Lachman were provided an opportunity for input and advanced a minority position. Qualified professionals considered the Lachman's views and their independent evaluations in an appropriately constituted MDSC. Since the local education agency bears the burden of proof in appropriately providing for handicapped children, it follows that *23 Illinois Administrative Code* 226 and 34 CFR 300 require the qualified professionals to be in control of the decision making process. 226.564 (Authority of School Board to Place Students) confers upon the district the right to control the direction and operation of its programs.

The relevant questions at this point are whether these qualified professionals recommended an educational program in the least restrictive environment as required under 226.125 and 34 CFR 300.5.b (1 & 2) and whether an appropriate IEP was formulated. A review of the evidence indicates that the district has appropriately discharged its responsibilities under 226.20 (Comprehensive Program of Special Education), 226.30 (Cooperative Special Education Programs), and 226.115 (Continuum of Program Options) and 34 CFR 300.551 (Continuum of Alternative Placements). The district has correctly argued that it has a responsibility to search the public continuum of services prior to any placement in a private special education facility. This is explicit and implicit under 226.125 (Least Restrictive Environment), 226.40 (Rights of Special Education—Exclusion, Suspension), 226.115 (Continuum of Options), 226.140

(Director of Special Education), 226.145 (Supervision), and 226.150 (Role of Local District Administrator).

Mr. and Mrs. Lachman's request that Benjamin be placed for 50 percent of his day at the Cueing Place of Children's Learning World is inappropriate because the district possesses special education facilities for hearing impaired students within its special education joint agreement. Testimony and evidence did not establish that Benjamin's needs are so severe and profound as to require only the program provided at the Cueing Place. That methodologies are employed by the district which are contrary to the parents' wishes is subject to the hearing officer's jurisdiction only insofar as said methods bear on the health, welfare, and safety of the child. Notwithstanding, testimony that Benjamin's speech, language, and reading might be delayed through the use of total communication, it is the province of the qualified professionals to determine the appropriate educational intervention strategies. The evidence is clear, moreover, that the district has operated in good faith through its willingness to incorporate cued speech into Benjamin's proposed placement. Good faith is further established by the district's willingness to train its speech/language diagnostician for purpose of inservicing special and regular educators in this approach in accordance with 226.890 (Personnel Development Program) and 34 CFR 300.383 (Personnel Development Plan) and 300.385 (Adoption of Educational Practices).

The district has appropriately met its least restrictive environment obligations by identifying two school sites (Sherwood and Forest View Schools) wherein

Benjamin could receive special education instruction for 50 percent of his day in a special education resource class for deaf students and be integrated into standard education classes to "the maximum extent appropriate" at those sites. The district has also agreed to provide for Benjamin in these sites and integrate him into standard education classes at Nelson School, Benjamin's neighborhood school. Again, at issue here is total communication and cued speech. The district appropriately holds that it shall determine the direction and methods of any speech interpreter. The Nelson School option is not appropriate for Benjamin because the logistics of travel will negatively encroach upon valuable instructional time.

The district's proposed placement is also appropriate because the diagnostic profile clearly indicates that Benjamin's speech is unintelligible and that he will benefit from special education instruction if speech and language therapy, as an educationally related service, is intertwined with special education instruction. The parents' request that Benjamin receive daily speech and language therapy does not directly link the educationally related service with special education instruction. Were Benjamin's needs so severe and profound as to require daily speech and language therapy, it would follow that this would have been a component in the Cueing Place. The record established that speech and language therapy by a qualified professional was not a dimension of the Cueing Place program. Said service would have to be privately contracted by the Children's Learning World or be provided through the neighborhood school. From a practical and logistical standpoint, the integration of this into Benjamin's special education instructional program would be fragmentary. The

provision of the special education services in one building would make the linkage between speech/language therapy and special education instruction direct.

The proposed placement is further appropriate because 226.230 requires that a "special teacher shall be responsible for intensive coordination with the standard program teacher." The sites identified by the district possess established programs for deaf children and qualified personnel who can collaborate with standard education teachers as Benjamin is integrated into standard classes. The parents' principal objection to the Sherwood and Forest View sites have to do with the mode of communication. Mr. and Mrs. Lachman are resolute in their opposition to manually signed English. They have tied their position regarding least restrictive environment to cueing. The hearing officer is unconvinced that transitioning to a total communication program will cause irreparable injury.

5. Have the child's rights been fully observed?

The evidence is overwhelming that district 63 has scrupulously respected Benjamin's rights. It is clear that the district has met the test established in *Rowley v. Board of Education* (458 U.S. 175). This test refers to at least three requirements of law: 1) the conferring of educational benefits upon the student, 2) sufficiency of educationally related services to allow the student to benefit from special education instruction, and 3) reasonably calculated program to allow the student to advance from grade to grade. The record clearly establishes that district 63 has proposed a program which meets this test. In sum, the district is not required to provide the best or most appropriate

program for Benjamin Lachman. Rather, *Rowley* requires that the district provide this student with a "basic floor of opportunity."

C. ORDER

1. The district's recommended placement is affirmed and shall be implemented for the 1986-87 school year.

2. Thirty (30) days from the last possible date for appeal, the district shall hold a MDSC to complete Benjamin Lachman's IEP. Any independent evaluations not disclosed to the district prior to the due process hearing shall be considered at that time. The IEP shall include the following:

   2.1 identification of the number of class periods or minutes Benjamin Lachman shall be enrolled in special and standard education instruction.

   2.2 identification of the number of minutes Benjamin Lachman shall receive speech/language therapy. Benjamin shall receive no less than three (3) thirty (30) minute sessions per week.

   2.3 annual goals and short term objectives for the following educationally related services: speech/language therapy, speech interpretation, and special transportation.

   2.4 any modifications necessary to facilitate integration into standard classes.

3. At the above ordered MDSC/IEP conference, the district shall document the following:

   3.1 inservicing of special and regular educators re Benjamin Lachman's individual and unique needs.

3.2 inservicing of special and regular educators in cued speech.

3.3 transition plan by which Banjamin Lachman will be integrated into his 1986-87 placement.

4. Upon completion of the first thirty (30) instructional days of the 1986-87 school year, the district shall convene an IEP conference to assess Benjamin's progress and revise the IEP accordingly.

5. Within sixty (60) days of the receipt of this decision letter, the district shall report its progress in implementing the above orders to the Compliance and Review Unit, Program Monitoring/Development, Illinois State Board of Education, 100 North First Street, Springfield, Illinois 62777.

Appendix D

ILLINOIS STATE BOARD OF EDUCATION

In the Matter of the Special Education of BENJAMIN LACHMAN and Maine Township Special Education Program	Level II Appeal ISBE 86-140

Decision of Impartial Hearing Officer Level II

I. PROCEDURAL BACKGROUND

A due process Level One Hearing was held on June 20, and July 3, 1986. Thereafter on July 7, 1986 a decision was rendered by Seth B. Harkins, Level I Hearing Officer. The Hearing Officer ordered that the recommendations included in the multidisciplinary report dated May 15, 1986, be implemented. This included the placement of Benjamin Lachman for the school year 1986-1987. The Order further provided for another multidisciplinary conference (MDC) to be conducted. This Order was entered on July 7, 1986.

On July 25, 1986 the parents of said minor timely filed a request for appeal with the Illinois State Board of Education. Pursuant to State Board of Education, Section 226.688 the appeal requested oral argument. By agreement of the parties the oral argument was held on September 16, 1986. Each party requested the right to file simultaneous briefs 7 days after the receipt of the transcript of the oral argument. Upon receipt of the briefs the Level II hearing was closed.

II. DUE PROCESS HEARING (LEVEL I) PARTICIPANTS

The Level I hearing was held on June 20 and July 3, 1986. The record reflects that on June 20, 1986, present were the following persons:

On Behalf of District 207:

Ms. Joyce Christensen, Director, MTSEP;
Dr. S. Stetina, Associate Superintendent, District 63;
Mr. Leo J. Athas, Attorney for MTSEP and NSSED;
Ms. Dorothy Eulass, Program Director, RHIP;
Ms. Jacqueline Kimel, Program Coordinator, RHIP;
Ms. Kathleen Hart, Special Language Diagnostician, RHIP;
Ms. Jean Boyer, School Psychologist, RHIP;
Ms. Ann Bleuer, Director, The Cueing Place;
Ms. Linda McElhany, Teacher Consultant, RHIP;
Mr. Michael Johnann, Director, LICA (1).

On Behalf of Benjamin Lachman:

Mr. Ronald Lachman, Father;
Ms. Mary All Lachman, Mother;
Mr. Richard S. Rhodes, Grandfather, Attorney;
Ms. Judith M. Rhodes, Grandmother.

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(1) The following are the full descriptions for the above abbreviations:

MTSEP	Main Township Special Education Program
NSSED	North Suburban Special Education District
RHIP	Regional Hearing Impaired Program, through North Suburban Special Education District

On July 3, 1986, the record reflects present were the following persons:

On Behalf of District 207:

Mr. Leo J. Athas, Attorney;
Ms. Joyce Christensen, Director, MTSEP;
Mr. Donald Stetina, Associate Superintendent, District 207;
Ms. Dorothy Eulass, Program Director, RHIP;
Ms. Jacqueline Kimel, Program Coordinator, RHIP;
Mr. Mike Johann, Director, LICA.

On Behalf of Benjamin Lachman:

Mr. Ronald Lachman, Father;
Ms. Mary Ann Lachman, Mother;
Mr. Richard S. Rhodes, Grandfather, Attorney;
Ms. Ann Bleuer;
Ms. Judith M. Rhodes, Grandmother;
Mr. Brent Brunetta;
Ms. Catherine R. Bieber.

Testimony was taken on behalf of District 207 from the following parties: Jacqueline Kimel, Dorothy Eulass, Katherine Hunt, Jean Boyer, Linda McElhany, Joyce Christenson.

On behalf of Benjamin Lachman, testimony was introduced from the following persons: Elaine S. Dunn, Ronald Lachman, Donald Stetina, Ms. Ann Bleuer, Mary Ann Lachman.

Closing arguments were also had by both parties.

III. SUMMARY OF FACTS

The Level I hearing officer convened the hearing on June 20, 1986. At that time opening remarks were made,

the hearing officer stated that the hearing is being held so that he can take whatever information is necessary to make a reasoned decision (Transcript, Page 7). As part of the record the parties stipulated to certain matters, specifically, it was agreed:

1. That Benjamin is a profoundly deaf child.
2. That he lives in the school district.
3. That he is a handicapped person entitled to special education as those terms are defined in the Federal and State Acts.
4. That he is entitled to a free, appropriate public education as the term is defined in the Federal and State Acts (Transcript, Page 84).

Extensive testimony was taken. The first school witness was Jacqueline Kimel. She is employed as the program coordination and teacher consultant for the regional hearing-impaired program. She stated that she had participated in the multi-disciplinary staff conferences of Benjamin Lachman including the conference on May 15, 1986 (Page 11). She described the existing program in the district (Pages 18-19). She further testified that the program had been described to the parents and rejected. In her opinion the parents rejected the program because it is implemented through a system of total communications which includes manually coding english as well as speech development, auditory training and speech reading. The visual system to code english used with Benjamin by the parents is cued speech. Throughout the hearing this continued to be the crux—whether Benjamin should be educated through the *total communication* approach or the *cued* approach.

The district through Dorothy Eulass indicated that the district will be exploring cued speech as a component in a total problem (Page 30). The School District has

made no commitment to such a program. The testimony further reflected that there is a belief that cued speech is no more than an equal alternative to the total communication approach (Page 35). Kathleen Hart, a speech and language diagnostician, testified as to her understanding of the total communication approach. Jean Boyer, school psychologist, testified to her examination of Benjamin Lachman. Joyce Christensen, the director of the Maine Township Special Education Program, also testified. She testified that Benjamin Lachman could have access to the regular kindergarten program at Nelson School with a cued speech interpreter provided by the school as part of the total package, that, in addition to the hearing impaired program offered by the Regional Hearing Impaired Programs. No further commitment was made to the employment of cueing as a device. Comment was made that the staff would be open to introducing cueing as part of the Speech Development Program (Page 58). It was further testified to that an interpreter had been offered as part of the program. The school directed program was also to include attendance at the hearing impaired program for part of the day and the mainstream for the other part (Page 59).

After the School District concluded its presentation, testimony was introduced on behalf of Benjamin Lachman. Elaine Dunne, a speech language pathologist, was called. She testified as to her professional evaluation of Benjamin Lachman. Among her opinions, she observed that she did not believe a self-contained program would be appropriate for Benjamin (Page 114). Ronald Lachman, the father of Benjamin Lachman, testified as to the ability and educational experience of his son.

The next witnesses were Dr. Stetina and Ann Bleuer. Dr. Stetina testified as to his observation of Benjamin at a regularly scheduled kindergarten. Ann Bleuer testified as

an expert on cued speech. She asserted that Benjamin Lachman should be mainstreamed (page 198). It was her opinion that the IEP was inappropriate and detrimental to Benjamin Lachman's progress (page 205). Mary Ann Lachman also testified as to her observations of her son.

After each side had concluded, there were closing arguments.

IV. POST HEARING PLEADINGS

The appeal of Benjamin Lachman raised numerous issues. The issues were initially raised in the request for appeal and thereafter in the oral argument and brief.

The initial pleading, the request for appeal on behalf of Benjamin Lachman, raised a number of issues. In their chronological order, they included:

The appeal was predicated upon the denial of a free appropriate public education for Benjamin Lachman in the least restrictive environment.

The appeal further recited the following reasons:

1. The decision did not require the school district to educate Benjamin Lachman in the least restrictive environment.
2. The decision erroneously portrayed a dispute between the parents and the school district.
3. The decision limited the review of the School District's actions to consideration of procedures followed.

The Request of appeal further recited the following reasons:

1. The hearing officer did not correctly perceive the issues.
2. The decision incorrectly excluded the evaluation procedures were correct.
3. The decision ceded all authority of the IEP to the School District.

4. The decision has partially mistreated the principal question before the hearing officer.
5. The conclusion that the School District has appropriately met the least restrictive environment is incorrect.
6. The decision mis-stated the parents requested or insisted on placement for one half of each day at the cueing place.
7. The decision put undue emphasis upon the fact the School District had a program in place.
8. The decision's conclusion that the School District had scrupulously respected Benjamin's rights was incorrect.

In essence, the request for appeal addressed the following requests:

1. The question of the least restrictive environment.
2. Fact issues as recited in categories 1, 2, 3, 4, 5, 6, 7, and 8.
3. The hearing officer limited his review to consideration of procedures followed only.

After oral argument was held, a memorandum was filed by Benjamin Lachman. The memorandum in support of the appeal of Benjamin Lachman raised three issues:

1. Benjamin Lachman has a legal right to attend his local public kindergarten with an interpreter.
2. The undisputed facts support Benjamin Lachman's right to attend his local public kindergarten with an interpreter.
3. Benjamin Lachman was denied procedural due process by the hearing officer and by the School District.

V. DISCUSSION

The brief of Benjamin Lachman sets forth the law. A student has the right to a free appropriate public educa-

tion in the least restrictive environment. He should be to the greatest extent possible, mainstreamed with other students. The issue is not whether to mainstream or not. The question is how best to accomplish the educational process of Benjamin Lachman, including mainstreaming him. The parents of Benjamin Lachman maintain that he should be entitled to attend a kindergarten (Nelson School) which is three blocks from the home and be supplied a cue instructor. The School District on the other hand, suggests a mix of self contained and general schooling as the proper vehicle. Extensive testimony was introduced, parts of which were previously referenced, as to the different methods of education. Reports were submitted. At the core there remains this difference in approach—either Benjamin has the right to a cue instructor or he is required to comply with the program of the school district which may include a cue instructor for part of the day. This hearing officer must decide as to the proper alternative.

The hearing officer feels the rights of Benjamin Lachman have been fully protected and an appropriate program has been established through the school district. When there are a number of methods of education of the impaired child the hearing officer does not believe the parent retain the sole right to choose the alternative. As correctly stated in the brief of the parents they must have input. The record is clear they have had such input. They cannot, however, by themselves be the determining force. The record supports the position taken by the school as the proper alternative.

To respond to the issue constructed in the brief of the parents. This appeal is not whether to mainstream or not *Denz*, *Bonadonna* and *Springdale* all conclude we should when possible, mainstream. The issue here is to what extent to mainstream. This issue is a fact issue which is

determined by the testimony and the record. The facts here indicate the solution of the school district to be preferable. The *Roncker* (2) case holds there is a strong preference to mainstreaming. It sets the standards. The hearing officer agreed that this is the law. The questions again is the application of the law to our facts. We are not faced with an issue of whether to mainstream or not, but to what extent to mainstream. The greatest possible extent test has been met by the school district.

As to the question of whether Benjamin Lachman was denied due process or not, the argument is advanced that the hearing officer did not render an informed decision but acted as a rubber stamp of the School District. A review of the decision and the record does not support this argument. An impartial review was received, the hearing officer complied with the directives and specified in the School Code and specifically the standard as set forth in Chapter 122, Section 14-8.02 (g) "an informed decision" was rendered. The argument here centers around a disagreement as to the contents of the decision. The parents dispute the factual conclusions that have been reached. The arguments of the parents as to a denial of due process are not persuasive.

VI. CONCLUSIONS OF FACT AND LAW

1. The law supports the decision of the Level I hearing officer. The Level I hearing officer has met the guidelines as set forth by Federal and State statute and existing regulations. The educational program of Benjamin Lachman provides him an education in the least restrictive environment.

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(2) *Bonadonna v. Cooperman*, 619 F Supp 401 (1985)
Community High School District 155 v. Denz, 124 Ill App 3d 129 (1984)
Roncker v. Walter, 700 F 2d 1058 (1983)
Springdale School District v. Grace, 494 F Supp 266 (1980)

2. The argument of Benjamin Lachman in both the request for appeal and memorandum that the questions decided in this appeal are basically questions of fact is correct. The facts support the decision of the Level I hearing officer. On the basis of the facts as presented in the testimony, the opinion of the Level I hearing officer is affirmed.

3. Benjamin Lachman was not denied procedural due process. The introductory comments of the hearing officer reflect an awareness of his responsibility. The record of testimony taken and decision rendered by the hearing officer support this conclusion. The argument of Benjamin Lachman regarding procedural due process is not persuasive nor supported by the record.

VII. ORDER

1. The Level I hearing officer decision is upheld. The appeal of Benjamin Lachman is denied.

2. The completed individual education program, as described by the Level I hearing officer, if not already implemented, shall be implemented within the next seven (7) days.

3. Notice of this order is hereby forwarded to the parties pursuant to Illinois State Board of Education, 23 Ill. Adm. Code 226, 690(c).

/s/ MEDARD M. NARKO
Medard M. Narko
Level II Review Officer

DATED: October 29, 1986

Appendix E

JUDGMENT—ORAL ARGUMENT

For the Seventh Circuit

Chicago, Illinois 60604

July 18, 1988.

Before

Hon. JOHN L. COFFEY, *Circuit Judge*
Hon. KENNETH F. RIPPLE, *Circuit Judge*
Hon. JESSE E. ESCHBACH, *Senior Circuit Judge*

RONALD LACHMAN and MARY ANN LACHMAN on behalf of BENJAMIN LACHMAN, a minor,
Plaintiffs-Appellants,

No. 87-2518 *vs.*

ILLINOIS STATE BOARD OF EDUCATION, EAST MAINE PUBLIC SCHOOL DISTRICT 63, and MAINE TOWNSHIP SPECIAL EDUCATION PROGRAM,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 86 C 9250
PRENTICE H. MARSHALL,
Judge

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.